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OLEOMARGARINE TAX CASES.

Supreme Court of the United States.

October Term, 1903.

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JAMES H. McKENNEY,
Clerk.

LEO W. McCRAY,
Plaintiff in Error,
vs.
THE UNITED STATES,
Defendant in Error.

No. 301.

BRIEF FOR PLAINTIFF IN ERROR.

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BRIEF FOR PLAINTIFF IN ERROR.

This is a civil action for debt for the recovery of the penalty provided for in Section 11 of the Act of Congress approved August 2, 1886, as amended May 9, 1902, and which section reads as follows:

> "Section 11: That every person who knowingly purchases or receives for sale any oleomargarine which has not been branded or stamped according to law shall be liable to a penalty of fifty dollars for each such offense."

The action was commenced, as disclosed by the record, by the filing of a petition in the United States District Court for the Southern District of Ohio, Western Division.

The petition is in the ordinary form, and seeks by its averments to charge the defendant with a violation, on October 22, 1902, of the provisions of Section 8 of said Act of August 2, 1886, as amended by Section 3 of the Act of May 9, 1902, in that the defendant did, on said day, purchase and receive for sale, twenty pounds of oleomargarine, which is alleged by said petition to have been "not free from artificial coloration" and did contain "additional coloring matter that caused it to look like butter of a certain shade of yellow," and which said oleomargarine had only been stamped by affixing internal revenue stamps of the value and at the rate of one-fourth cent per pound, whereas, it is alleged, the same should have been stamped according to law by affixing thereto internal revenue stamps of the value and at the rate of ten cents per pound, and that by reason thereof said defendant became and is liable by reason of the premises to a penalty of fifty dollars for such offense under and by virtue of the provisions of Section 11, quoted above; and for which sum plaintiff prays judgment.

The answer of the defendant, after making certain formal admissions of averments made in the petition, contains two separate and distinct defenses.

FIRST DEFENSE.

Defendant says that on the 24th day of October, 1902, being a retail dealer in oleomargarine, as alleged in plaintiff's petition and hereinbefore admitted, and having paid the tax of six dollars imposed and required as hereinbefore alleged and admitted, he did, with full knowledge of the facts in relation thereto, purchase and receive for sale in the course of his business, and at his place of business in the City of Cincinnati, a package containing 20 pounds of oleomargarine from the said

The Ohio Butterine Company, corporation as aforesaid; that said oleomargarine had been manufactured, compounded and prepared for sale by said corporation from a formula used by it, in the course of its business, and known as "high grade" and contained the following ingredients, in the proportions given, and none other, that is to say: Oleo oil, 20 pounds; neutral lard, 30 pounds; creamery butter, 50 pounds; milk and cream, 30 pounds; common salt, 7 pounds; that said oleomargarine, though containing only the ingredients named, was of a yellow color; that said yellow color in said finished article of oleomargarine was imparted to it by the use, employment and introduction in the manufacture thereof, as one of the constituent, elementary and necessary ingredients and parts thereof, of said fifty pounds of creamery butter; that said creamery butter was purchased in the open market and was the food product usually known as butter and which is made exclusively from milk or cream or both, as defined in Section 1 of the Act of Congress of August 2, 1886, to wit: "That for the purpose of this act the word 'butter' shall be understood to mean the food product usually known as butter, and which is made exclusively from milk or cream, or both, with or without common salt, and with or without additional coloring matter;" that said creamery butter so purchased and used in the manufacture of said oleomargarine was of a rich yellow color; that said color was derived from the use, as an ingredient in its manufacture, of a substance known as Wells-Richardson's Improved Butter Color, a substance universally used in the United States in the manufacture of butter, for the purpose of imparting a deep yellow color; that the same is neither harmful nor injurious for human consumption; that no additional or other coloring matter of any kind whatever was used or introduced into the finished product of oleomargarine by the said The Ohio Butter-

ine Company; that the oleomargarine so purchased and received by the defendant was wholesome and nutritious, and free from any deleterious or injurious ingredient.

Defendant further says that the said The Ohio Butterine Company, manufacturers of said package of oleomargarine, from which said package was purchased and received as aforesaid, had paid the special tax imposed and required by the acts of Congress relating to butter and oleomargarine, and had otherwise conducted its business in compliance with all the requirements of said acts; that said package so purchased and received by the defendant as aforesaid, had been packed, marked, stamped, branded and labeled in compliance with all the provisions of said acts and with all the regulations thereunder prescribed by the Commissioner of Internal Revenue and the Secretary of the Treasury.

Defendant admits that said package of oleomargarine at the time he so purchased and received it, had been stamped by affixing internal revenue stamps thereto of the value and at the rate of one-fourth of one cent per pound, but denies that the same was not stamped according to law, or otherwise in violation of the provisions of Section 3 of the Act of May 9, 1902.

Defendant had full knowledge of the character and condition of said package of oleomargarine, both as to the ingredients it contained and the amount of tax paid thereon.

Defendant further says that the cost of manufacture of wholesome and nutritious oleomargarine like that contained in said package is such that it can not be sold in competition with butter if the tax of ten cents per pound be imposed and paid.

The color of high grade oleomargarine manufactured as aforesaid, by the use and introduction of said creamery butter, as one of the necessary and essential ingredients in the manufacture thereof, was of a light shade of yellow and not of the same deep yellow color possessed by said creamery butter. The

natural color of butter at the time of the alleged offense was of a lighter shade of yellow than that made in the spring season and nearly white, and of a lighter shade than the taste of butter consumers in the United States demands. The butter of trade and commerce is artificially colored by the use of said Wells-Richardson's butter color or other similar substance in order to impart a deeper shade of yellow. There is little demand in the United States for either butter or oleomargarine which is not of the deep yellow shade of said spring butter.

SECOND DEFENSE.

For a second defense to the petition this defendant says, that the act of Congress relating to butter and oleomargarine of August 2, 1886, as amended by the act of Congress of May 9, 1902, in so far as it imposes a tax of ten cents per pound upon oleomargarine containing "artificial coloration that causes it to look like butter of any shade of yellow," and in so far as it authorizes the Commissioner of Internal Revenue "to decide what substances, extracts, mixtures or compounds which may be submitted for his inspection in contested cases are to be taxed under this act," and provides that "his decision in the matter of taxation under this act shall be final," is in contravention of the Constitution of the United States and of the amendments thereto, and is illegal and void, for the following reasons, to wit:

(1) The act deprives the defendant of his property without due process of law.

(2) The act is an unwarranted encroachment upon and interference with the police powers reserved to the several states and to the people of the United States.

(3) The act invests an inferior executive officer with the power, finally and arbitrarily, to determine an essentially judicial question concerning vast property rights.

(4) The act so arbitrarily discriminates against oleomargarine in favor of butter as to destroy the oleomargarine industry for the benefit of the butter industry in the United States, and is thus repugnant to those fundamental principles of equality and justice which are inherent in the Constitution of the United States.

The defendant in error (plaintiff below) demurred to the answer of plaintiff in error (defendant below) which demurrer was sustained.

ASSIGNMENT OF ERRORS.

The District Court erred in sustaining the demurrer of the United States to the answer of plaintiff in error (defendant below).

The District Court erred in refusing to hold that the act of Congress, approved August 2, 1886, as amended by the act of Congress, approved May 9, 1902, is in contravention of the Constitution of the United States of America and of the amendments thereto, and is illegal and void, for the reasons

(a) The act deprives the defendant of his property without due process of law.

(b) The act is an unwarranted encroachment upon and an interference with the police powers reserved to the several states and to the people of the United States.

(c) The act so arbitrarily discriminates against oleomargarine in favor of butter as to destroy the oleomargarine industry for the benefit of the butter industry in the United States, and is thus repugnant to those fundamental principles which are inherent in the Constitution of the United States.

The District Court erred in holding, if said act be not in contravention of the Constitution of the United

States, that oleomargarine which contains no artificial coloration than that imparted to it by the use of butter which itself contains coloring matter and which therefore causes said oleomargarine to look like butter of a shade of yellow, is subject to a tax of ten cents per pound instead of a tax of one-fourth of one cent per pound.

ARGUMENT.

I

It is admitted and not denied, that the action was properly instituted, and no challenge was made to the jurisdiction of the District Court.

U. S. Revised Statutes, Section 563 provides as follows:

"Sec. 563. The District Courts shall have jurisdiction as follows:

* * * * * * * *

"Third. Of all suits for penalties and forfeitures incurred under any law of the United States."

The Federal Courts have jurisdiction of suits brought by the United States without regard to the amount in controversy.

U. S. vs. Sayward, 160 U. S., 493.

"Suits for penalties and forfeitures" mean *civil actions* for the recovery of the penalty and forfeiture.

U. S. vs. Mann, 1 Gall., 177.

U. S. vs. Bromley, 12 How., 88.

"The action of debt lies for a statutory penalty, because the sum demanded is certain, but though in form *ex contractu*, it is founded in fact upon a tort."

Chaffee vs. U. S., 18 Wall., 516.

This cause is properly cognizable by this court upon writ of error direct from the District Court because the constitutionality of a law of the United States is drawn in question.

Act of March 3, 1891, 26 U. S. Stat., 827, Section 5.

II.

The act, whose validity is challenged by the plaintiff in error, as being an unconstitutional enactment, is the act of Congress, approved May 9, 1902, and entitled "An act to make oleomargarine and other imitation dairy products, subject to the laws of any state or territory or the District of Columbia, into which they are transported, and to change the tax on oleomargarine, and to impose a tax, provide for the inspection, and regulate the manufacture and sale of certain dairy products, and to amend an act entitled 'An act defining butter, also imposing a tax upon and regulating the manufacture, sale, importation, and exportation of oleomargarine,' approved August 2, 1886."

Under the contention of the plaintiff in error upon this argument, and on the second defense set out in his answer, the validity of Section 3 of the Act of May 9, 1902 is especially challenged. This section provides as follows:

"Section 3. That Section 8 of an act entitled 'An act defining butter, also imposing a tax upon and regulating the manufacture, sale, importation and exportation of oleomargarine,' approved August 2, 1886, be, and the same is hereby, amended so as to read as follows:

"Section 8. That upon oleomargarine which shall be manufactured and sold, or removed for consumption or use, there shall be assessed and collected a tax of ten cents per pound, to be paid by the manufacturer thereof; and any fractional part of a pound in a package shall be taxed as a pound: Provided,

when oleomargarine is free from artificial coloration that causes it to look like butter of any shade of yellow, said tax shall be one-fourth of one cent per pound."

III.

THE RULE FOR CONSTRUING THIS STATUTE.

In the construction of the statutory or local laws of a state, it is frequently necessary to recur to the history and situation of the country in order to ascertain the reason, as well as the meaning, of many of the provisions in them, to enable a court to apply, with propriety, the different rules for construing statutes.

Preston v. Browder, 1 Wheaton, 121.

* * * We must gather their intention (i. e., members of congress) from the language there used, comparing it, when any ambiguity exists, with the laws upon the same subject, and looking, if necessary, to the public history of the times in which it was passed.

Aldridge v. Williams, 3 Howard, 24.

In construing an act of Congress, the court may recur to the history of the time when it was passed, in order to ascertain the reason for, as well as the meaning of, particular provisions in it; but the views of individual members in debate, or the motives which induced them to vote for or against its passage, cannot be considered.

United States v. Union Pacific R. R. Co., 91 U. S., 72.

In endeavoring to ascertain what the Congress of 1862 intended, we must, as far as possible, place ourselves in the light that Congress enjoyed, look at things as they appeared to it, and discover its purpose from the language used in connection with the attending circumstances.

Platt v. Union Pacific R. R. Co., 99 U. S., 48, 64.

The two foregoing cases are cited and approved in

Smith v. Townsend, 148 U. S., 494, 495.
R. R. Co. v. Tennessee, 153 U. S., 502.

Even in construing the terms of a statute, courts must take notice of the history of legislation, and, out of different possible constructions, select and apply the one that best comports with the genius of our institutions and, therefore, most likely to have been the construction intended by the law-making power.

R. R. Co. v. Inter State Com. Com., 162 U. S., 218.

* * * The only proper way to construe a legislative act is from the language used in the act, and, upon occasion, by a resort to the history of the times when it was passed.

U. S. v. Freight Ass'n., 166 U. S., 318.

"In whatever language a statute may be framed, its purpose and its constitutional validity must be determined by its natural and reasonable effect."

Henderson vs. Wickham, 92 U. S., 259.

"When, therefore, Congress undertakes to enact a law, which can only be valid as a regulation of commerce, it is reasonable to expect to find on the face of the law or from its essential nature, that it is a regulation of commerce with foreign nations, or among the several states or with the Indian tribes. If not so limited, it is in excess of the power of Congress,"

Trademark Cases, 100 U. S., 82, 96.

(*Syllabus.*) "In whatever language a statute may be framed, its purpose must be determined by its natural and reasonable effect; and the presumption that it was enacted in good faith, for the purpose expressed in the title, cannot control the determination of the question whether it is, or is not, repugnant to the Constitution of the United States."

(*Opinion.*) "The presumption that this statute was enacted in good faith, for the purpose expressed in the title, namely, to protect the health of the people of Minnesota, cannot control the final determination of the question whether it is not repugnant to the Constitution of the United States. There may be no purpose upon the part of a legislature to violate the provisions of that instrument, and yet a statute enacted by it, under the forms of law, may, by its necessary operation, be destructive of rights granted or secured by the Constitution. In such cases, the courts must sustain the supreme law of the land by declaring the statute unconstitutional and void. This principle of constitutional interpretation has been often announced by this Court. In Henderson, etc., vs. New York, etc., 92 U. S., 259, 268, where a statute of New York imposing burdensome and almost impossible conditions on the landing of passengers from vessels employed in foreign commerce, was held to be unconstitutional and void as a regulation of such commerce, the court said that 'in whatever language a statute may be framed, its purpose must be determined by its natural and reasonable effect.' In People vs. Campagnie Generale Transatlantique, 107 U. S., 59, 63, where the question was as to the validity of a statute of the same State, which was attempted to be supported as an inspection law authorized by Section 10 of Article 1 of the Constitution, and was so designated in its title, it was said: 'A State cannot make a law designated to raise money to support paupers, to detect or prevent crime, to guard against disease and to cure the sick, an inspection law, within the constitutional meaning of that word, by calling it so in the title. So, in Soon Hing v. Crowley, 113 U. S., 705, 710. The rule is general, with reference to the enactments of all legislative bodies, that the courts cannot inquire into the motives of the legislators in passing them, except as they may be disclosed on the face of the acts, or inferable from their operation, considered with reference to the condition of the country and existing legislation. The motives of the legislators, considered as to the purposes they had in view, will always be presumed to be

to accomplish that which follows as the natural and reasonable effect of their enactments.' In Mugler vs. Kansas, 123 U. S., 623, 661, the Court, after observing that every possible presumption is to be indulged in favor of the validity of a statute, and that the judiciary must obey the Constitution rather than the law-making department of the government, and must, upon its own responsibility, determine whether, in any particular case, the limits of the Constitution have been passed. It was added: 'If, therefore, a statute purporting to have been enacted to protect the public health, the public morals or the public safety, has no real or substantial relation to these objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution. Upon the authority of those cases, and others that could be cited, it is our duty to inquire, in respect to the statute before us, not only whether there is a real or substantial relation between its avowed objects and the means devised for attaining those objects, but whether by its necessary or natural operation it impairs or destroys rights secured by the Constitution of the United States.' * * * Our duty to maintain the Constitution will not permit us to shut our eyes to these obvious and necessary results of the Minnesota statute. If this legislation does not make such discrimination against the products and business of other states in favor of the products and business of Minnesota as interferes with and burdens commerce among the several states, it would be difficult to enact legislation that would have that effect."

Minnesota vs. Barber, 136 U. S., 313.

We may also, with propriety, call to our aid in interpreting this statute, the debates in Congress when this act was under discussion. A reference to them, will not be altogether uninteresting, but, on the contrary, illustrative of the history of this law and the condition of the country and existing legislation at the time it was passed.

That it was not a revenue measure, but designed for an altogether different purpose, it is not out of place to advert to an overflowing treasury and the expediency which this same Congress felt in reducing the revenue derived under the Span-

ish War acts, in this same year, by an amount equal to seventy millions of dollars.

By reference to the speeches of Senator Spooner and Senator Dolliver, who were the champions of the measure in the Senate, it will at once appear that the validity of the law was then challenged upon the ground that it was avowedly not a revenue measure, but a police regulation—a thing which Congress was without power to enact.

> Congressional Record, 57 Congress, First Session.
> Senator Dolliver, pp. 3273 to 3277.
> Senator Spooner, pp. 3505 to 3506, 3560 and 3563, 3601 and 3606.

We desire especially to call the Court's attention to the argument made by Senator Hoar, found on pages 3280 and 3281 of the same record. To our minds it is potent in illustrating just what we claim to be the infirmity of the bill as it was finally enacted into law. Senator Hoar says in no doubtful terms, that;

"This ten cents a pound is a tax not on oleomargarine, but on fraud or false coloring. It does not touch the product of the manufacturer of oleomargarine, and his product of oleomargarine is not taxed under this bill when we come to the last analysis. It is the fraud, the coloring to make it look like butter, that we are putting the tax on."

And again,

"This tax is in substance on the fraud, and not on the manufacture."

The following presents a still different view:

"Mr. Bacon.—I understand the Senator from Massachusetts to base his support of the bill upon the proposition that this tax on colored oleomargarine is justifiable in order to protect the other tax. In other words, this tax of ten cents a pound is justifiable in order to protect the government in the collection of the two cent

tax or the one-fourth cent tax, as the case may be. The question I want to ask the learned Senator is this: If there were no two cent or quarter cent tax, would there be any ground upon which he could base the constitutionality of this act?"

"Mr. Hoar.—I think not."

We are not unmindful of the rule that the motives of Congress in passing the law cannot be called in question by the Judicial Department of the Government, but we insist that on the face of this law itself it is perfectly apparent that the tax of ten cents a pound on colored oleomargarine can have no other operation or effect than to usurp the police power which did not belong to Congress. The ten cent tax being avowedly an effort to tax the supposed fraud or coloring in oleomargarine strips it of every element of a revenue measure. It is not, as the Senator concedes, a tax on the product, but it is an attempt to tax that which is not property, namely, a fraud.

The act of May 9, 1902, is in terms, as well as by indirection, in the attempted use of the Federal taxing power, a deliberate invasion of the police powers reserved to the states when the Constitution was adopted and never surrendered by them. This is so by the adopted rule of construction and by every reasonable intendment to be derived from the use of language employed in the framing of the statute.

There is upon the face of the act itself a discrimination, unwarranted and arbitrary, in the imposition of a tax of one-fourth of one cent per pound on oleomargarine when the product is white, and a tax of forty times that amount, or ten cents per pound, on the same product, when it is of any shade of yellow that causes it to look like butter.

It is an attempt by Congress, beyond its powers, to establish a police regulation in the manufacture, production and sale of the food product known as oleomargarine.

That the Federal and State power and authority is always to be kept inviolate, is manifested by the positive declarations

of the Supreme Court of the United States in a number of its decisions, notable in the opinion rendered by Chief Justice Fuller, in the case of the United States vs. E. C. Knight Co., 156 U. S., 1-12, in which we find the language of the Chief Justice to be as follows:

"It is vital that the independence of the commercial power and of the police power, and the delimitation between them, however sometimes perplexing, should always be recognized and observed, for while the one furnishes the strongest bond of union, the other is essential to the preservation of the autonomy of the States as required by our dual form of government; and acknowledged evils, however grave and urgent they may appear to be, had better be borne than the risk be run, in an effort to suppress them, of more serious consequences by resort to expedients of even doubtful constitutionality."

The canon of Chief Justice Marshall, so often referred to we adopt as the keynote of this discussion:

"Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are clearly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the Constitution, are constitutional."

McCulloch vs. Maryland, 4 Wheat., 421.

The Congress of the United States is restricted and limited by the Constitution in the exercise of powers. It can exercise such powers only as are in terms or by necessary implication delegated to it. It can exercise such delegated powers only for the purposes designed by the Constitution in the terms of delegation.

The framers of the Constitution sought to and did avoid ambiguities and all uncertainties. No disguise was offered. No opportunity for an abuse or power by indirection was presented.

Nothing could have been farther from the great minds which framed the instrument than the employment of the delegated power of taxation for purposes other than those named. Nor can we impute to them an omission in the use or combination of language, which, in after years, can be availed of, to ruin and destroy one legitimate industry and impoverish those engaged in it, to thereby profit and enrich another.

If such be so, then the letter and spirit of the Constitution have been misunderstood and misinterpreted for more than a hundred years.

IV.

POLICE POWER RESERVED TO STATES.

In the course of the opinion delivered by Mr. Justice Harlan in the case of Patterson vs. Kentucky, 97 U. S., page 503, and quoting from Cooley's Constitutional Limitations, the Court says:

"In the American constitutional system," says Mr. Cooley, "the power to establish the ordinary regulations of police has been left with the individual States, and can not be assumed by the National Government."

Continuing, Justice Harlan says:

"While it is confessedly difficult to mark the precise limitations of that power, or to indicate, by any general rule, the exact limitations which the States must observe in its exercise, the existence of such a power in the States has been uniformly recognized by this Court."

Citing:

Gibbons vs. Ogden, 9 Wheat., 1;
The License Case, 5 How., 104;
Gilman vs. Philadelphia, 3 Wall., 713;
Henderson vs. The Mayor of the City of New York, 92 U. S., 259;
Railroad Company vs. Husen, 95 U. S., 465;
Beer Company vs. Mass., 97 U. S., 25.

"It is embraced in what Chief Justice Marshall, in Gibbons vs. Ogden, called that 'immense mass of legislation' which can be most advantageously exercised by the States, and over which the national authorities cannot assume supervision or control."

It cannot be denied that the power of a state to protect the lives, health, and property of its citizens, and to preserve good order and the public morals, "the power to govern men and things within the limits of its dominion," is a power originally and always belonging to the States, no surrendering of them to the general government, nor direct restraint by the Constitution of the United States, and essentially exclusive.

V.

THE TAXING POWER OF CONGRESS.

U. S. Const. Art 1, Sec. 8, Par. 1. "The Congress shall have power to lay and collect taxes, duties, imposts, excises, to pay the debts, and provide for the common defense and general welfare, of the United States; but all duties, imposts, and excises, shall be uniform throughout the United States:"

Par. 18, of same section: "To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this constitution in the government of the United States, or in any department or officer thereof."

This delegates power to Congress, and it has no other. "All legislative powers herein granted shall be vested in a Congress

of the United States," etc. (Art. 1, Sec. 1.) To execute this power the laws passed must be necessary and proper for the purpose. (Art. 1, Sec. 8, Par. 18.) The Tenth Amendment of the Constitution confirms all this. This amendment provides: "The powers not delegated to Congress by the Constitution nor prohibited by it to the States, are reserved to the States respectively, or to the people."

It is a revenue power vested in Congress as a substitute for the Eighth Article of the Confederation, giving to the Federal Government an express power to raise its own revenue independent of State action; as it had been dependent on State will under the Confederation. The language imports a revenue power to lay and collect. These words are wedded and are not to be divorced. Taxes are not to be laid except to be collected; revenue is the object of the grant and none other. Hence no other should be employed.

The tax upon oleomargarine provided for in this act of May 9, 1902, is distinctly within the definition of the term excise.

> Pacific Insurance Co. vs. Soule, 7 Wall., 433-440;
> Veazie Bank vs. Fenno, 8 Wall., 433;
> Scholey vs. Rew, 23 Wall., 331;
> Springer vs. United States, 102 U. S., 585.

A question which for many years excited great contention was whether the words of the clause of the Constitution "to pay the debts, and provide for the common defense and general welfare of the United States" was a grant of a distinct power or whether they declare only the object of the tax power preceding.

That the latter is the proper interpretation to be given to the words of this clause of the Constitution, is fortified by an almost unanimous weight of authority.

Judge Story, on the Constitution, says: "That this interpretation is supported by reasoning at once solid and impregnable; that it is, as if it read, 'The Congress shall have power to lay and collect taxes, etc., in order to pay the debts and to provide for the common defense and general welfare of the United States; that is, for the purpose of paying the public debts and providing for the common defense and general welfare of the United States.'" And he quotes the argument of Mr. Jefferson in favor of this construction, with strong approbation.

Storey on the Constitution, sections 907, 908, 926.

We ask the question, is it legitimate to give to the power of taxation, which is ordinarily but a means for effecting the purposes of power, the larger function of unlimited discretion in selecting objects not within the delegated power? Is it legitimate thus indirectly to carry into effect an ungranted power—a power which, being ungranted and if not prohibited to the states, is reserved to them? Is not this a usurpation by indirection, through taxation, as flagrant as if it were a bald exercise of an ungranted power?

In the very early case of Gibbons vs. Ogden, 9th Wheaton, 1-199, Chief Justice Marshall says: "Congress is not empowered to tax for those purposes which are within the exclusive province of the States." And the Chief Justice argues that though the State and the United States tax the same subject, they exercise diverse powers, because each taxes for the objects confided to it, and neither can tax for the powers confided to the other. And in that connection it was that he used the sentence just quoted. Therefore, though Congress might deem that the exercise of a state power was in a certain sense for the common defense and general welfare, it could not exercise it, because the purpose was in the exclusive province of the States,

and reserved to them, because not delegated to the United States.

We are not unmindful of the rule that this limitation of the purpose for which taxes may be levied by Congress, while historically interesting, is really addressed to the legislative discretion rather than to the judicial power, for the reason that the specific purposes for which the proceeds of taxes are to be expended are not declared in the acts of Congress levying them, and the courts can not therefore look beyond the acts themselves to discover those purposes; implying necessarily that if the acts themselves upon their face (Trademark cases, 100 U. S., 82-96) or by observing the declared rule of construction (Minnesota vs. Barber, 136 U. S., 313) are to be held and determined by their natural and reasonable effect and operation and the courts are not to be controlled by the declared object in the title of the act, then we contend that this act read in the light of these rules, must manifestly expose a purpose to destroy one business operating in a wholesome food product (Schollenberger vs. Pennsylvania, 171 U. S., 1) to benefit another, to wit: the butter industry.

In the case of Fairbank vs. United States, 181 U. S., 312, the court said: "The objects and modes of taxation have become a matter of special scrutiny."

The second and third paragraphs of the syllabus of this case expresses more clearly and exactly our contention made on this argument.

They are as follows:

"An act of Congress is to be accepted as constitutional, unless on examination it clearly appears to be in conflict with provisions of the Federal Constitution."

"If the Constitution in its grant of powers is to be able to carry into full effect the powers granted, it is equally imperative that where prohibition or limitation is placed upon the power of Congress, that prohibition or limitation should be enforced in its spirit and to its entirety."

In this case the court held unconstitutional a Federal tax which had been exercised without question at different periods for over 100 years.

This Court has also said in the case of Nichols vs. Ames, 173 U. S., 515, "The power to tax is the one great power upon which the whole national fabric is based. It is not only the power to destroy, but it is also the power to keep alive."

In the case of McCullouch vs. Maryland, 4 Wheaton, 316, a decision of the Supreme Court rendered in the year 1819, by Chief Justice Marshall, and a case that is notable as others of his opinions are, in that it cites no authority, for there were none to cite, but a case in which such men as Webster, Pinckney and Attorney-General Wirt appeared as counsel, the Court held

"That the state within which the branch of the United States bank was located, could not, without violating the Constitution, tax that branch."

"That the power of taxation is retained by the States; that it is to be concurrently exercised by the two governments are truths which have never been denied. But such is the paramount character of the Constitution that its capacity to withdraw any subject from the action of even this power, is admitted."

And it was in the opinion in this case that the expression, "The power to tax involves the power to destroy" first found lodgment in the decisions of the Supreme Court, but in the following language: "That the power to tax involves the power to destroy; that the power to destroy may defeat and render useless the power to create; that there is a plain repugnance, in conferring on one government a power to control the constitutional measures of another, which other, with respect to those very measures, is declared to be supreme over that which exerts the control, are propositions not to be denied. But all

inconsistencies are to be reconciled by the magic of the word confidence. Taxation, it is said, does not necessarily and unavoidably destroy. To carry it to the excess of destruction would be an abuse, to presume which would banish that confidence which is essential to all governments."

The court was unanimous, in the opinion in the case just cited, that the law passed by the legislature of Maryland imposing a tax on the bank of the United States was unconstitutional and void.

In the case of Osborn vs. United States, 9th Wheaton, 738, decided by the Supreme Court in 1824, the tax was one levied by the State of Ohio, taxing the banks of the United States Fifty Dollars on each office of discount and deposit in the state. And the Court said "To tax its facilities was to tax the bank itself."

Again in the great case of Brown vs. Maryland, 12th Wheaton, 419, decided in 1827, and being another decision of the great Chief Justice, it was said in his opinion rendered in that case, "It has been observed that the powers remaining with the States may be so exercised as to come in conflict with those vested in Congress. When this happens, that which is not supreme must yield to that which is supreme."

It is to be observed that in the cases just cited there was concurrent power of taxation in the general government and in the States, but that the Constitution, being supreme, state authority must end when found in conflict with the true exercise by Congress of a power delegated to it by the Constitution.

In the case at bar there is no such concurrent exercise of power or conflict of authority claimed, but it is insisted that Congress has attempted by the provisions of the act of May 9, 1902, to invade and usurp under the guise of a revenue measure the police power of the states which is by the Constitution itself specially reserved to the States themselves.

In the case of the Veazy Bank vs. Fenno, 8th Wall., 533, in an opinion by Chief Justice Chase for the court, there was again an illustration of the conflict between National and State authority in the exercise of concurrent power.

It is not to be denied that in the Veazy Bank case the power of taxation was involved with no purpose of revenue in view, but solely to destroy the interest or business upon which the tax was levied by taxing it out of existence.

In the course of its opinion the Court held "That it was a duty or excise tax and not direct; that franchises granted by the State are subject to taxation like other property, and even if the tax was excessive and indicative of a purpose to destroy the franchise, that was a question for Congress and not for the court. But apart from this, Congress having undertaken to provide a currency for the whole country, it could constitutionally secure the benefit of it to the people by appropriate legislation. It could therefore by suitable enactments restrain the circulation as money, of any notes, not issued under its own authority."

It must be manifest to the Court that the latter consideration, in the quotation just given, was the controlling one.

The paramount question presented upon this argument is: *Is it constitutional to use this taxing power for the purpose of suppressing one business because it rivals another and when, too, it is done, not as a means of revenue,—though some revenue may be derived from it—but as a bald police regulation?*

The question would seem clear that a power granted as a means of raising revenue can not lawfully be diverted from its legitimate purpose, by the indirect use of it, to do what Congress has no power to do by direction. The end is not legitimate (McCulloch vs. Maryland, 4th Wheaton, 316.)

It is true, that where the law merely imposes the tax, without disclosing the indirect purpose of its imposition, the

courts might hesitate to declare the law unconstitutional, though we insist that by equal authority, if the purpose be disclosed on the face of the act the courts should not hesitate to do so.

Cooley on the Constitution, pp. 57-60.
Loan Association vs. Topeka, 20 Wall., 655.
Powell vs. Pennsylvania, 127 U. S., 678.

In the case of Gibbons vs. Ogden, Chief Justice Marshall says: "Congress is not empowered to tax for any purposes which are within the exclusive province of the States."

It would seem to follow as a natural and reasonable argument that Congress is not empowered to tax so as to suppress that which is within the exclusive province of the States. If fraud exists, the remedy is with the States themselves. If, upon the face of this act, it is manifest, that the taxing power of the United States is sought to accomplish that which is clearly within the police power of the States to regulate by appropriate State legislation, and is without the power of Congress to so regulate, it becomes at once under every rule of construction, interpretation and intendment an invalid and unconstitutional law.

VI.

DUE PROCESS OF LAW AND THE PUBLIC PURPOSES OF TAXATION.

United States Constitution, 5th Amendment.
United States Constitution, 14th Amendment.

The Act of May 9th, 1902, by its operation manifestly works an appropriation of private property without due process of law, and is therefore against both the letter and spirit of the Constitution of the United States.

In Fletcher vs. Peck, 6 Cr., 135, Chief Justice Marshall said:

"It may well be doubted whether the nature of society and of government does not prescribe some limits to the legislative. And if any be prescribed, where are they to be found, if the property of an individual fairly and honestly acquired may be seized without compensation."

Chief Justice Chase in the Legal Tender Cases, 12 Wall., 581, declared:

"And if the property of an individual cannot be transferred to the public, how much less to another individual."

In accord with these declarations, the late Mr. Justice Miller, in Loan Association vs. Topeka, 20 Wall., 655, speaks with great force upon this subject in the celebrated opinion rendered by him in that case.

"The theory of our governments, state and nation, is opposed to the deposit of unlimited power anywhere. The executive, the legislative, and the judicial branches of these governments are all of limited and defined powers. There are limitations on such powers which grow out of the essential nature of all free governments. Implied reservations of individual rights, without which the social compact could not exist, and which are respected by all governments entitled to the name." * * *

"Of all the powers conferred upon governments, that of taxation is the most liable of abuse. * * *

"The power to tax is therefore the strongest, the most pervading of all the powers of government, reaching directly or indirectly to all classes of the people. It was said by Chief Justice Marshall, in the case of McCulloch vs. The State of Maryland, 4 Wheat., 431, that the power to tax is the power to destroy. * *

"This power can as readily be employed against one class of individuals and in favor of another, so as to ruin the one class and give unlimited wealth and prosperity to the other, if there is no implied limitation of the uses for which the power may be exercised. * * *

"To lay with one hand the power of the government on the property of the citizen, and with the other to bestow it upon favored individuals to aid private enterprises and build up private fortunes, is none the less a robbery because it is done under the forms of law and is called taxation. This is not legislation. It is a decree under legislative forms."

VII.

If the court should, however, find the acts of August 2, 1886, and May 9, 1902, to be valid and constitutional acts, we still contend that the government ought not to recover in this case for the reason that oleomargarine which contains no artificial coloration except such as is imparted by the colored butter, which is one of its constituent parts, as was the case with the oleomargarine which is the subject matter of this action, is not properly subject to a tax of ten cents per pound, but only to a tax of one-fourth of one cent per pound.

We believe it is conceded by everybody that butter is a proper and well-recognized ingredient in, or component part of, the better grades of oleomargarine, and that if the butter thus used does not itself contain any additional coloring matter, the oleomargarine in which it is used is subject only to the one-fourth of one cent tax, unless it contains some other "artificial coloration." To illustrate what we mean, it is a well-known fact that butter produced during the months of May and June, when the grass is fresh and green, has a natural yellow color, being the color, which, as has been well said, is given to it by Nature. This butter when used as an ingredient in oleomargarine will, in the very nature of things, inevitably and naturally impart to the manufactured product a tinge of yellow. Now, assuming that the oleomargarine thus made has no artificial coloring matter in it, we do not believe it will be seriously

contended by anybody that it will be subject to the ten cent tax.

We admit that it would have been subject to the ten cent tax if the Act of May 9, 1902, had passed Congress as originally introduced. As introduced and as first passed by the House of Representatives, the bill provided as follows:

"Sec. 8.—That upon oleomargarine * * * there shall be assessed and collected a tax of ten cents per pound, * * * * Provided, when oleomargarine is free from coloration *or ingredient* that causes it to look like butter of any shade of yellow, said tax shall be one-fourth of one cent per pound." (Italics ours.)

If the bill had become a law in this form, clearly any oleomargarine which contained any ingredient, be it natural yellow butter, cotton-seed oil, or any other yellow vegetable oil, which imparted to the product a yellow tinge, would be subject to the ten cent tax.

The record, however, shows that the Senate deliberately and advisedly struck out the words "or ingredient" and inserted the word "artificial," so that the language now reads: "Provided, when oleomargarine is free from *artificial* coloration that causes it to look like butter of any shade of yellow said tax shall be one-fourth of one cent per pound," and this action was concurred in by the House of Representatives, and is now the law.

This amendment was offered by Senator Foraker, of Ohio, who, in advocating its adoption, said, among other things:

"The other amendment which I propose to offer is to strike out the words 'ingredient or,' found at the end of line 25 on page 2, and to strike out the same words where they occur on page 3. The language that I wish to amend is the following:

And any person that sells, vends, or furnishes oleomargarine for the use and consumption of others, except to his own family and guests thereof without compensation, who shall add to or mix with such oleomargarine any ingredient or coloration that causes it to look like butter of any shade of yellow shall also be held to be a manufacturer of oleomargarine within the meaning of said act, and subject to the provisions thereof.

"By striking out the words 'ingredient or' and inserting the word 'artificial,' as I should have stated that my amendment provides, the language would read as follows:

And any person that sells, vends, or furnishes oleomargarine for the use and consumption of others, except to his own family and guests thereof without compensation, who shall add to or mix with such oleomargarine any artificial coloration that causes it to look like butter of any shade of yellow shall also be held to be a manufacturer of oleomargarine within the meaning of said act, and subject to the provisions thereof.

"The necessity for that is in this: From the bulletin furnished us by the Director of the Census, to which I referred a moment ago, it is shown that in each of the formulas according to which oleomargarine is made there are ingredients used that must of necessity give to it some slight shade of yellow, and I may remark in this connection that in all the cases which have gone to the Supreme Court of the United States the testimony reviewed, or the testimony that was offered and rejected, has been testimony showing, according to the finding of the Supreme Court of the United States, that the natural color of oleomargarine shows some slight shade of yellow. That has been shown, I believe, in every one of the decisions. It must of necessity occur if oleomargarine be made according to these formulas. I will not take the time to read from all of them, but only from the last one:

Formula 3.—High grade.

	Pounds.
Oleo oil	100
Neutral oil	130
Butter	95
Salt	32
Color	½
Total	357½

"In other words, 95 pounds out of a total of 357 1-2 pounds of the product is butter itself.

"According to the other formulas no butter is used, but cream and milk are used in one and milk in the other, and other ingredients which of necessity would give some slight shade of yellow. That being the case, for us to provide that no ingredient shall be used that will lend any shade of yellow whatever to the color of oleomargarine would be for us to make it impossible for oleomargarine to be made according to any acceptable or known formula now in use, and certainly would make it impossible for it to be manufactured in accordance with the most acceptable formula,

that numbered 3, as given in this bulletin by the Director of the Census.

"Now, unless we intend absolutely to prohibit the manufacture of oleomargarine, we ought not so to provide in our bill as to bring about that result. I understand it is not claimed that the purpose of the bill is to prohibit. If that were the claim, many of us could not support it at all. But it is only to impose a tax on the doing of that thing which may lead to fraud, imposition, and deception. If that be true, if our purpose is to allow it to be made according to these acceptable formulas and sold according to its merit, then we ought not to prohibit the putting in of ingredients which are absolutely necessary to make an acceptable and wholesome product.

"For that reason I shall move to amend, as I have already indicated, by striking out the words 'ingredient or' and inserting the word 'artificial,' so that the only thing prohibited by the bill with respect to the matter of color will be the putting into oleomargarine of any artificial coloration. That, I think, ought to be prohibited. I think the manufacturers of the product ought to be allowed to use the other ingredients just as they are using them."

The record shows that no exception was taken to these remarks of the Senator from Ohio, and the amendment was adopted without even a division. (See Congressional Record, 57th Congress, 1st Session, p. 3840.) Under these circumstances, how can it be claimed that oleomargarine containing any ingredient which has a natural yellow color and which has thus imparted to it a tinge or shade of yellow, has in it "artificial coloration," and is therefore taxable at ten cents a pound? To assert that this would be "artificial coloration" is doing violence to words; and we leave this branch of the subject confident that our contention with respect to it is correct. Any other construction would make meaningless the amendment referred to.

Our claim, however, is that even if the butter used contains additional coloring matter, the oleomargarine in which it is

used, if free from any other "artificial coloration," is subject only to the lower tax. In other words, our contention is that under the law as it now stands, butter which contains additional coloring matter cannot be construed to be "artificial coloration that causes it to look like butter of any shade of yellow," as defined in the Act of May 9, 1902.

The grounds for our contention are, briefly stated, as follows:

In the first place, as above stated, butter has always been a proper ingredient in the manufacture of oleomargarine, adding, as it does, to the quality and flavor of the product.

This presence of butter in oleomargarine has been not only commercially recognized as a proper ingredient, but it has also been so recognized in the legislation enacted on the subject. Section 2 of the Act of August 2, 1886, defines oleomargarine as follows:

"Sec. 2.—That for the purposes of this Act certain manufactured substances, certain extracts, and certain mixtures and compounds, *including such mixtures and compounds with butter*, shall be known and designated as 'oleomargarine,' * * * (Italics ours.)

In other words, Congress has in express terms said that "for the purpose of this Act" butter is a proper ingredient in oleomargarine, and this legislative recognition has uniformly obtained since 1886.

If Congress had contented itself with this recognition of butter in oleomargarine as shown above, it might very well be urged that the only butter that could be used is butter in its pure and original state, just as it comes from the dairy, and free from any foreign substance or ingredient. This condition does not, however, obtain; for Congress has again given a definition "for the purposes of this Act."

Section 1 of the Act of August 2, 1886, provides as follows:

"That for the purpose of this Act the word 'butter' shall be understood to mean the food product usually known as butter, and which is made exclusively from milk or cream, or both, with or without common salt, *and with or without additional coloring matter.*" (Italics ours.)

This definition of butter is repeated in the Act of May 9, 1902, Section 4 of which, among other things, provides as *follows:*

"Sec. 4.—That for the purpose of this Act 'butter' is hereby defined to mean an article of food as defined in 'An Act * * * approved August 2, 1886.'"

Congress having thus defined butter, we do not see how there is any escape from the conclusion that the "butter" which may be included in the mixtures and compounds described in Section 2 is butter "with or without additional coloring matter." This is clearly apparent when we remember that the word "butter" occurs in the operative part of the Act of August 2, 1886, only in Section 2, and that therefore the definition of butter in Section 1 has reference solely and entirely to the "butter" which may be included in such mixtures and compounds. In other words, a fair and proper interpretation of the language used in the Act would result in a definition of oleomargarine about as follows: "Certain manufactured substances, certain extracts, and certain mixtures and compounds, including such mixtures and compounds with butter, *with or without additional coloring matter in said butter,* shall be known and designated as oleomargarine, etc."

In discussing this question, we think it important to consider the purposes of the Act of August, 1886, as amended by the Act of May 9, 1902. The purposes of the Act are to impose special taxes upon manufacturers of and dealers in oleomargarine, and to assess a tax upon all oleomargarine which shall

be manufactured and sold or removed for consumption or use. And to carry out and execute these purposes certain well-defined regulations pertaining to the manufacture of oleomargarine and the manner of its sale are prescribed by the Act, together with penalties for the violation of any of its provisions.

It is to be noted that the only subject legislated upon by this Act is oleomargarine. Butter is in no sense whatever a subject-matter of legislation in the Act. It is mentioned in Section 1 simply to define it "for the purpose of this Act." In Section 2 it is mentioned only to designate it as one of the proper and lawful ingredients of oleomargarine.

In other words, Congress was careful not only to recognize butter as a proper ingredient, but also to expressly prescribe the kind of butter that might be so used. It thereby fixed a standard for the butter to be used. This standard consists of two kinds of butter, viz.: butter with coloring matter and butter without coloring matter. Either kind of butter complies with and is up to the standard fixed. For the purposes of the Act, either kind may be used as an ingredient in oleomargarine as properly and lawfully as the other. No exception can be taken to the use of either kind. A manufacturer may, under the Act, make two kinds of oleomargarine, one with uncolored butter as an ingredient, and another with colored butter; and the one will be just as lawful and legitimate a product as the other.

Congress having thus recognized colored butter as a legitimate ingredient, we claim that it clearly comes within the class of other proper products used in the manufacture of oleomargarine, such as oleo, neutral, lardine, suine, etc., and that it is not in any sense an additional substance used for the purpose of artificially changing or altering the character of the finished product.

To state our position illustratively: A manufacturer of oleomargarine desires to make his product in a manner that

will subject it only to the lower tax. He gathers together its constituent or component parts in the proportions in which he desires to mix them. These parts consist of oleo oil, neutral oil, butter, cotton-seed oil and salt. He does not add to or mix with these ingredients any coloring matter whatsoever. Observe that these constituents are not only all well-recognized and legitimate ingredients, but they are natural, if we may use the term, as distinguished from artificial, ingredients. We claim that oleomargarine thus made is free from "artificial coloration," even though the butter and the cotton-seed oil in it impart a yellow tinge, for they are in no sense "artificial" ingredients designed to change the appearance or character of the product. In fact, the appearance these ingredients give to the product is perfectly natural, for being proper ingredients they partake of the nature of the product. Before the oleomargarine above described can be said to contain "artificial coloration" within the meaning of Section 8, the manufacturer must deliberately add to it some ingredient in addition to the lawful and proper ingredients above mentioned, with the intent of changing the color imparted by those ingredients to a color that causes it to look like butter of any shade of yellow.

To hold otherwise, would simply resolve the whole matter into a question of color; that is, yellow oleomargarine shall be taxed ten cents per pound, and white oleomargarine one-fourth of one cent per pound. We cannot believe that anybody will claim that Congress had any such idea in view. If it had, it could have said so in a bill of ten or fifteen lines; and all the debates on the subject could have been dispensed with. What Congress did mean to do was to place a ten cent tax upon oleomargarine which was "artificially" colored, with intent to make it look like butter, and to place a tax of one-fourth of one cent per pound upon oleomargarine which contained only the component parts properly making up the product, among which is butter as defined by the Act itself.

Our position in this matter is clearly shown and emphasized by the language used in the additional definition of a manufacturer of oleomargarine as contained in Section 2 of the Act of May 9, 1902. That definition is as follows:

"And any person that sells, vends, or furnishes oleomargarine for the use and consumption of others, except to his own family table without compensation, who shall *add to or mix with* such oleomargarine any artificial coloration, * * * shall also be held to be a manufacturer of oleomargarine, etc."

Surely it cannot be said that a person who sells or vends oleomargarine that has a yellow tinge imparted to it by butter or cotton-seed oil, or any other legitimate ingredient, is a manufacturer within the meaning of this section. Certainly not; because before such construction can be given, he must "*add to or mix with* such oleomargarine any artificial coloration, etc." He may add this "artificial coloration" to oleomargarine which he has purchased in the open market and which is already slightly tinged by butter or cotton-seed oil, so as to give it a deeper yellow, or he may add it to white oleomargarine, which contains no butter or cotton-seed oil. In either event, he would come within the definition; but he would not come within it until he actually "added to or mixed with" it the "artificial" coloration.

Could anything more clearly and emphatically disclose the meaning of Congress that "artificial coloration" is something *in addition* to the proper ingredients of oleomargarine as defined in the Act? We think not; for we must not forget that Sections 1 and 2 were in force when the Act of May, 1902, was under consideration, and we must assume that Congress was aware of the definitions given in those sections of butter and oleomargarine. Congress therefore knew, when it passed the Act of May 1902, that butter, with or without additional coloring matter, is and always has been, a proper and lawful com-

ponent part of oleomargarine; and therefore when it struck out the words "ingredient or" in Section 8 and inserted the word "artificial," it clearly meant that the coloration necessary to subject the product to the ten cent tax must be imparted, not by a lawful ingredient, but by something which is placed in the product in addition to such ingredients for the purpose of causing it to look like butter of any shade of yellow.

To give any other construction to the Act than the one we contend for, the Court would have to entirely ignore, wipe out, and make ineffective Sections 1 and 2, and the amendments to the Act of May 9, 1902; which, if followed to its logical conclusion, would make the use of any kind of butter impossible. This, we submit, cannot be done. The act must be read as a whole, and each section construed with reference to every other section. If this is done we confidently believe this Court will hold that butter, as defined in the Act of August 2, 1886, is a lawful and proper component part of oleomargarine, and that the coloring matter in the butter cannot be construed to be "artificial coloration" within the meaning of Section 3, as amended by the Act of May 9, 1902.

Respectfully submitted,

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